

**BEFORE THE
ALCOHOL AND TOBACCO COMMISSION**

WALGREEN CO.)	Type 208 Application
d/b/a WALGREENS No. 4668)	Excise District No. 1
1003 N. MAIN ST.)	
CROWN POINT, INDIANA)	
)	
PERMIT NO. DL 45-26666)	Lake County Local Board
)	
Applicant-Petitioner)	

WALGREEN CO.)	Type 208 Application
d/b/a WALGREENS No. 1712)	Excise District No. 1
200 FRANCISCAN DR.)	
CROWN POINT, INDIANA)	
)	
PERMIT NO. DL 45-26667)	Lake County Local Board
)	
Applicant-Petitioner)	

WALGREEN CO.)	Type 208 Application
d/b/a WALGREENS No. 10123)	Excise District No. 1
10795 BROADWAY)	
CROWN POINT, INDIANA)	
)	
PERMIT NO. DL 45-26668)	Lake County Local Board
)	
Applicant-Petitioner)	

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

**I.
BACKGROUND OF CASE**

Petitioner, Walgreen Co., d/b/a Walgreens No. 4668 located at 1003 N. Main St., Crown Point, Indiana, Walgreens No. 1712 located at 200 Franciscan Dr., Crown Point, Indiana, and

Walgreens No. 10123 located at 10795 Broadway, Crown Point, Indiana (collectively, “Applicant” or “Walgreens”) applied for type 208¹ Alcohol and Tobacco Commission (the “Commission”) permits, numbers DL 45-26666, DL 45-26667, and DL 45-26668 (“Permits”). Walgreens’ applications for the Permits were assigned to the Alcoholic Beverage Board of Lake County (“Local Board”). The Local Board held a hearing on April 1, 2010 (“LB Hearing”) and voted 3-1 to deny the Permits, with the Excise Officer voting in favor of the Permits. On April 20, 2010, the Commission voted to deny the applications for the Permits.

On May 6, 2010, Walgreens timely filed Petitioner’s Objection to and Request for Administrative Review and Hearing of the Commission’s Denial of Applications and Request for Consolidation of Appeals. No remonstrators petitioned to intervene in the appeals for any of the Permits.

The matter was set for hearing on August 24, 2010 (“ATC Hearing”), before Hearing Judge E. Edward Dunsmore (“Hearing Judge”), and at that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. (ATC Hearing). The Hearing Judge also took judicial notice of the entire contents of the files related to the Permits in this case (“ATC File”). Having been duly advised of the facts and law at issue, the hearing Judge now submits these Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
 - 1. Lisa McKinney Goldner, attorney for Applicant;

¹ Liquor, beer, and wine (drug store) dealer permit in an incorporated area.

2. Ana Filby, Walgreens Store Manager for Store No. 4668, located at 1003 N. Main St., Crown Point, Indiana;
3. Joyce DeRolf, Walgreens Store Manager for Store No. 1712, located at 200 Franciscan Dr., Crown Point, Indiana; and
4. Henry M. Gilliana III, Walgreens Store Manager for Store No. 10123, located at 10795 Broadway, Crown Point, Indiana.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

Permit DL 45-26666– Store No. 4668

1. Manager's Statement of Ana Filby, Store Manager for Store No. 4668, which contained the following exhibits:
 - a. Exhibit 1 – Affidavit of Compliance Regarding Notice Posting, February 19, 2010
2. Petitions of Support of the Applicant for Permit No. DL 45-26666 at Store No. 4668 containing 181 customer signatures with 90% in favor of the application.
3. Commission document showing results of Indiana Excise Police Survey for Alcohol Compliance for selling to minors indicating drug stores had the second lowest percentage of non-compliance and package liquor stores and restaurants with the highest rates of non-compliance.

Permit DL 45-26667– Store No. 1712

1. Manager's Statement of Joyce DeRolf for Store No. 1712, which contained the following exhibits:
 - a. Exhibit 1 – Affidavit of Compliance Regarding Notice Posting, February 18, 2010
2. Petitions of Support of the Applicant for Permit No. DL 45-26667 at Store No. 1712 containing 178 customer signatures with 94% in favor of the application;

Permit DL 45-26668 – Store No. 10123

1. Manager's Statement of Henry M. Gilliana III, Store Manager for Store No. 10123, which contained the following exhibits:
 - b. Exhibit 1 – Affidavit of Compliance Regarding Notice Posting, February 18, 2010
2. Petitions of Support of the Applicant for Permit No. DL 45-26668 at Store No. 10123 containing 257 customer signatures with 98% in favor of the application;

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. Al Krygier, Manager of local package liquor store.

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause.
1. One page containing 8 signatures opposing Permit No. DL 45-26666;
 2. One page containing 9 signatures opposing Permit No. DL 45-26667; and
 3. One page containing 10 signatures opposing Permit No. DL 45-26668.

III.

EVIDENCE PRESENTED BEFORE THE COMMISSION

- A. Walgreens, the sole party to this appeal, attended the ATC Hearing with its counsel, Lisa McKinney Goldner, Esq. and Alex C. Intermill, Esq., and four witnesses, whose testimony is addressed below. No remonstrators attended the ATC Hearing.
- B. Official notice was taken of the ATC file for this matter.
- C. The following testimony was offered at the ATC Hearing in favor of Walgreens:

Walgreens Store No. 4668 – DL 45-26666

1. Ana Filby, Store Manager for Walgreens No. 4668, testified the information contained in her Manager's Statement, which was submitted at the LB Hearing, and her testimony before the Local Board regarding Walgreens' training and security measures, her experience at Walgreens, etc., remain correct and accurate.

Prior to the ATC Hearing, Walgreens conducted two separate polls, one before the LB Hearing and one before the ATC Hearing. The first poll sampled 181 customers who were at least twenty-one years old and 163 (90%) of those polled were in favor of the Permit. In the more recent poll taken after the LB Hearing, 475 of 524 (90%) of Walgreens customers over the age of twenty-one were in favor of the Permit. Approximately, 75% of the customers from the second poll listed Crown Point as their address. Ms. Filby believes the signatures on the petitions provide a good representation of the community's desire concerning the Permit.

Ms. Filby believes that Walgreens will serve a specific clientele with the Permit – customers who desire the convenience of completing all of their shopping at Walgreens and those who cannot go to a package liquor store because they have minors with them whom they cannot leave in the car.

Stockhouse Liquors (a package liquor store in Crown Point, Indiana) is the only entity that has been fighting against Walgreens' efforts to obtain the Permit.

2. Steve Gagne, District Manager for Walgreens², testified that the training and security measures to be utilized by Walgreens Store Nos. 4668, 1712, and 10123 have been implemented without issue at other Walgreens in Lake County, Indiana, that have received alcohol permits. There have been no issues with theft, security system malfunctions, or violations of alcoholic beverage laws at any of the Walgreens stores in Lake County that have permits.

Walgreens desires to provide a limited selection of wine and beer to answer the requests of its customers who have been asking for Walgreens to once again sell alcohol in its stores.

Walgreens Store No. 1712 – DL 45-26667

1. Joyce DeRolf, Store Manager for Walgreens No. 1712, testified the information contained in her Manager's Statement, which was submitted at the LB Hearing, and her testimony before the Local Board regarding Walgreens' training and security measures, her experience at Walgreens, etc., remain correct and accurate.

Prior to the ATC Hearing, Walgreens conducted two separate polls, one before the LB Hearing and one before the ATC Hearing. The first poll sampled 178 customers who were at least twenty-one years old and 168 (94%) of those polled were in favor of the Permit. In the more recent poll taken after the LB Hearing, 306 of 331 (93%) of Walgreens customers over the age of twenty-one were in favor of the Permit. Approximately, 72% of the customers from the second poll listed Crown Point as their address. Ms. DeRolf believes the signatures on the petitions provide a good representation of the community's desire concerning the Permit.

Ms. DeRolf believes that the elderly and other customers like her who cannot or do not want to go to a package liquor store and/or do not want to stand in a long line at a grocery store desire the convenience of completing all of their shopping at Walgreens, which includes the ability to buy alcohol.

2. Steve Gagne, District Manager for Walgreens No. 1712, offered the same testimony described above as support for Permit DL 45-26667.

² Anas al-Hamwi is the District Manager for Walgreens Store No. 4668; however, the testimony offered by Mr. Gagne, who is the District Manager for Walgreens Store Nos. 1712 and 10123, applies equally to Store No. 4668. In the interests of efficiency, Mr. Gagne testified on behalf of all three Walgreens locations at issue. Mr. al-Hamwi was present at the ATC Hearing.

Walgreens Store No. 10123 – DL 45-26668

1. Henry Gilliana, Store Manager for Walgreens No. 10123, testified the information contained in his Manager's Statement, which was submitted at the LB Hearing, and his testimony before the Local Board regarding Walgreens' training and security measures, his experience at Walgreens, etc., remain correct and accurate.

Prior to the ATC Hearing, Walgreens conducted two separate polls, one before the LB Hearing and one before the ATC Hearing. The first poll sampled 257 customers who were at least twenty-one years old and 251 (98%) of those polled were in favor of the Permit. In the more recent poll taken after the LB Hearing, 498 of 511 (98%) of Walgreens customers over the age of twenty-one were in favor of the Permit. Approximately, 73% of the customers from the second poll listed Crown Point as their address.

Mr. Gilliana believes customers expect convenience at Walgreens and are looking for the "one-stop shopping" experience.

2. Steve Gagne, District Manager for Walgreens No. 10123, offered the same testimony described above as support for Permit DL 45-26668.
- D. The following exhibits were admitted as part of the ATC Hearing record as evidence offered by Walgreens in favor of issuing the Permit:
1. Additional petitions collected by Walgreens prior to the ATC Hearing with approximately 524 Walgreens customer signatures with 90% in favor of the Permit. (Exhibit A – for Permit No. DL 45-26666).
 2. Additional petitions collected by Walgreens prior to the ATC Hearing with approximately 331 Walgreens customer signatures with 93% in favor of the Permit. (Exhibit A – for Permit No. DL 45-26666).
 3. Additional petitions collected by Walgreens prior to the ATC Hearing with approximately 511 Walgreens customer signatures with 98% in favor of the Permit. (Exhibit A – for Permit No. DL 45-26666).

**IV.
FINDINGS OF FACT**

1. Walgreen Co. d/b/a Walgreens Nos. 4668, 1712, and 10123, is the applicant for the Type 208 ATC Permit Nos. DL 45-26666, DL 45-26667, and DL 45-26668. (ATC File).

2. The Applicant meets the qualifications to hold a permit, pursuant to IC 7.1-3-4-2, IC 7.1-3-5-2, IC 7.1-3-10-2, IC 7.1-3-15-2, and 905 IAC 1-27-1. (LB Hearing, ATC Hearing).
3. The remonstrator at the LB Hearing who spoke against Walgreens did not show that he would be personally aggrieved, or adversely affected by the issuance of the Permit. (LB Hearing).
4. Only one (1) person signed as a remonstrator against the Permits at the LB hearing. That person also testified at the LB hearing in opposition to the Permits and submitted petitions containing signatures as evidence that there is no need and desire for the Permits. The petition for DL 45-26666 contained eight (8) signatures, for DL 45-26667, nine (9) signatures, and for DL 45-26668, ten (10) signatures. The remonstrator from the LB hearing did not attend the ATC Hearing, or submit any additional evidence to be considered by the Commission. (LB Hearing; ATC Hearing; ATC File).
5. Seven (7) people signed as persons in favor of the issuance of the Permits. Of those, three (3) people, in addition to counsel for Walgreens, testified in favor of the Permits at the LB hearing. Petitions were submitted for each of the three (3) Walgreens Permits as evidence that the community needs and desires the Permits. The results of those petitions were: 163 signatures with 90% in favor of DL 45-26666, 168 with 94% in favor of DL 45-26667, and 257 with 98% in favor of DL 45-26668. At the ATC Hearing, the Applicant submitted additional petitions containing signatures of customers that were collected after the LB Hearing. The results of those petitions were: 524 signatures with 90% in favor of DL 45-26666, 331 signatures with 93% in favor of DL 45-26667, and 511 signatures with 98% in favor of DL 45-26668. Four (4) people testified at the ATC Hearing in favor of the Permits. (LB Hearing; ATC Hearing; ATC File).
6. Walgreens has extensive security measures to deter and prevent theft of alcohol and the sale of alcohol to minors. In addition, Walgreens' employees are thoroughly trained to avoid problems with theft and the sale of alcoholic beverages to minors and intoxicated people. (LB Hearing; ATC Hearing).
7. Based on the petitions submitted by Walgreens, the petitions submitted by the remonstrator at the LB Hearing, testimony regarding customer inquiries, and the availability of Type 208 permits allowed under the quota for Lake County, there is a need and desire for the Permits. (LB Hearing; ATC Hearing).
8. The Applicant has submitted substantial evidence that it is qualified to hold a Type 208 permit. (LB Hearing; ATC Hearing).

9. The Permits are not being placed within two hundred (200) feet of a church and/or school. (LB Hearing).
10. The Permits are being placed in commercial locations and are not being placed in residential areas. (LB Hearing).
11. The ATC has determined in a recent study that retail outlets such as Walgreens have relatively few incidents of selling alcohol to minors compared to package liquor stores and restaurants. (LB Hearing).
12. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9.
2. The permit applications were properly submitted, pursuant to IC 7.1-3-1-4.
3. The Commission is authorized to act upon proper applications for permits. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of the proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeals on behalf of the Commission, including a public hearing and a review of the records and documents for each of the above-captioned matters in the Commission's file. IC 7.1-3-19-11(a); 905 IAC 1-37-11(e)(2); *see also* IC 4-21.5-3-27(d).
6. Evidence at the ATC Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on the matters officially noticed in the proceedings. 905 IAC 1-37-11(e)(2); IC 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1; IC 7.1-3-9-10.
8. Walgreens is not disqualified from holding an ATC permit. IC 7.1-3-4-2; IC 7.1-3-15-2.

9. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.
10. In determining whether to issue a permit, the Commission shall investigate the desirability of the permit in regard to the potential geographical location of said permit. In making this determination, the Commission may consider, *but is not limited to the following factors*: (a) The need for such services at the location of the permit; (b) the desire of the neighborhood or the community to receive such services; (c) impact of such services on other business in the neighborhood or community; and (d) impact of such services on the neighborhood or community. 905 IAC 1-27-4.
11. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
12. Where an applicant shows that customers would be willing to purchase alcoholic beverages, if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4; *see e.g.*, ATC Findings of Fact and Conclusions of Law, *American Oil Company, Inc.*, Permit Nos. DL49-18873 and DL49-18879, *citing* 905 IAC 1-27-4(b).
13. There is a need for a Type 208 permit at each of the above-captioned locations. LB Hearing; ATC Hearing; ATC File; 905 IAC 1-27-4.
14. The Commission may reverse the Local Board's action in denying the application for a permit if it finds that the Local Board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. IC 7.1-3-19-11.
15. The ATC may also review an applicant's application *de novo*. *Id.*
16. The Local Board's recommendation is clearly erroneous, when there is a lack of substantial evidence to support the recommendation. *Id.*
17. The Commission may decline to follow the recommendation of a local board where the recommendation is unsupported by substantial evidence. *Id.*
18. The Local Board denied the applications for Permit Nos. DL 45-26666, DL 45-26667, and DL 45-26668 without sufficient evidence to support a finding that these permits should not be issued.

19. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the findings of the Lake County Local Alcoholic Beverage Board, resulting in 3-1 votes, concerning the denials of the Applications for Permit Nos. DL 45-26666, DL 45-26667, and DL 45-26668 were not supported by substantial evidence and the Alcohol and Tobacco Commission should approve said Applications. The Applications filed by Walgreen Co. d/b/a Walgreen Co., d/b/a Walgreens No. 4668, located at 1003 N. Main St., Crown Point, Indiana, Walgreens No. 1712, located at 200 Franciscan Dr., Crown Point, Indiana, and Walgreens No. 10123, located at 10795 Broadway, Crown Point, Indiana, for the Type 208 Alcohol and Tobacco Commission Permit Nos. DL 45-26666, DL 45-26667, and DL 45-26668, were sufficient and said permits should be GRANTED.

DATED: October _____, 2010.

E. Edward Dunsmore, Hearing Judge

Approved this _____ day of _____ 2010.

P. THOMAS SNOW, CHAIRMAN

DAVID JOHNSON, VICE CHAIR

DALE STURTZ, COMMISSIONER

FRANK GUTHRIE, COMMISSIONER